SUPREME COURT, U. S.

FILED
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R. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1192

New York Central Railroad Company, a Delaware Corporation, a/k/a Penn Central Transportation Company (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

v.

Winifred Pinzur, as Administratrix of the Estate of Henry Pinzur, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 28, 1970.

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No.

New York Central Railroad Company, a Delaware Corporation, a/k/a Penn Central Transportation Company (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

v.

Winifred Fisher, as Administratrix of the Estate of Hazel Fisher, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Penn Central Transportation Company, Debtor in Reorganization (hereinafter "Railroad") respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals for the Second Circuit dated October 15, 1970.

Opinions and Orders Below

On November 13, 1969, the District Court for the Southern District of New York entered judgment in the amount of $250,000 in favor of respondent, Winifred Fisher, as

Administratrix of the Estate of Henry Fisher, Deceased, against Railroad. No opinion was rendered by the District Court except an indorsed memorandum by Judge MacMahon granting plaintiff's motion to set aside the first verdict which is appended hereto at page 1a.

No opinion was rendered by the Court of Appeals for the Second Circuit affirming the judgment of the District Court.

Jurisdiction

The date of the judgment of the Court of Appeals sought to be reviewed is October 15, 1970. It was entered on the same day. A copy of that judgment is appended hereto at page 2a.

This Court's jurisdiction is invoked pursuant to § 28 U.S.C. 1254(1).

Questions Presented

1. Is there a jury question as to whether a plaintiff representing an employee of record of a trucking subsidiary of a railroad may recover for his death from the railroad under Federal Employers' Liability Act when:

a) There is no claim of the negligence of the railroad as such, but only of deceased's co-workers.

b) The railroad owns the trucking company's stock and has made unrepaid advances to it which are only a fraction of the trucking company's net worth accumulated from operating gains.

c) All of the subsidiary's directors except one are officers or employees of the railroad.

d) There are no officers in common except a secretary whose functions are limited to formal corporate record keeping.

e) The subsidiary's officers receive their compensation solely from the subsidiary and do not share in the railroad's officer's pension plan. Transportation activities of the subsidiary are directed by it, not the railroad.

f) Subsidiary employees other than officers are entirely separate from railroad employees with separate labor representation under separate contracts with different unions for subsidiary employees. They are paid by the subsidiary. They have different skills and supervisors than railroad employees and there is no interchange of employees. The subsidiary's employees were in the Social Security system, not the Railroad Retirement system, and the subsidiary carried Workmen's Compensation for its employees.

g) The subsidiary's vans are loaded on to the railroad cars by subsidiary employees without direction from railroad employees. Railroad employees do not inspect until after loading has been completed and took no part in the events leading to the death herein. The subsidiary owned or leased its own terminals on or near the railroad's lines and maintained its own separate offices.

h) The subsidiary receives its own income including that from operations under joint tariffs, keeps separate accounts and has separate accountants.

i) The subsidiary owns and finances its own equipment separate from the railroad and appropriate to a trucking company with no use by or for the railroad except in joint tariff operations. It has business unrelated to Railroad.

j) The railroad files tariffs on behalf of the subsidiary as well as for others and has transferred to the subsidiary certain certificates for local substituted service which constitute only a small proportion of the subsidiary's business.

k) The railroad takes care of the subsidiary's advertising, collections and billing and solicits shipments under joint tariffs.

l) Plaintiff applied for and received Workmen's Compensation on account of the death of her husband.

2. When the issue of the identity of the employer is to be determined and an election of remedies to take compensation has been pleaded, may the facts that the employer of record carried Workmen's Compensation for the deceased and that plaintiff sought and obtained such compensation be admitted?

Statutory Provision Involved

The statutory provision which the case involves is Section 1 of the Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended by 53 Stat. 1404 (1939), 45 U.S.C. § 51:

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U.S.C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

Statement of the Case

A. The Proceedings Below

The amended complaint bases the claim of jurisdiction solely on the Federal Employers' Liability Act. Deceased, as employee of New York Central Transport Company (the subsidiary, hereinafter "Transport"), is claimed to have been "on loan to defendant". The second "cause of action" claims Transport was "a subsidiary, arm, adjunct and in effect an extension of defendant" so that deceased was employed by defendant.

The answer denies the material allegations of the amended complaint and pleads affirmatively that there was no employment relationship between deceased and defendant. Transport is alleged to have certified to the New Jersey workmen's compensation authorities that deceased received his injuries as its employee and compensation was established and accepted by plaintiff and her children. Election of remedies is claimed barring the action.

There have been three trials of the two issues presented arising out of the death of plaintiff's decedent while taking part in attaching a "Flexi-Van" owned by his employer of record, Transport, to a flatcar owned by Railroad on the tracks of Railroad at the North Bergen, N. J. yard of Transport.

The first trial in the Southern District of New York was limited to the issue of whether deceased was an employee of Railroad. Judge MacMahon submitted the issue to the jury, reserving on motions. The jury's answer was in the negative.

Plaintiff moved for a new trial. Judge MacMahon granted the motion on the ground that evidence as to Workmen's Compensation benefits paid by Transport's insurer was improperly received.

The second trial likewise was limited to the issue of employment. Judge Croake submitted the issue to the jury after a trial in large part on the same evidence, without evidence on Workmen's Compensation paid by Transport's insurer and with the addition of evidence from deceased's co-workers present at the accident. The jury's verdict was in the affirmative. Railroad's offer of proof as to compensation benefits was denied. Likewise motions to dismiss at the end of plaintiff's case and for a directed verdict at the close of the case were denied along with Railroad's motion after the verdict for judgment n.o.v.

The third trial was on the issue of negligence, contributory negligence and damage. Plaintiff's verdict on these issues is not here raised as an issue.

B. The Facts

1. *Evidence at the First Trial*

Relations Between Transport and Railroad

Railroad owns all of Transport's outstanding stock. It has also made outstanding advances beyond the original capitalization of $1,000.00 in 1956 of about $2,600,000. From retained earnings, Transport, in the year of the accident, 1967, had a net worth over $6,400,000 and the following year almost $9,000,000.

Transport's Board of Directors has always consisted of one Transport officer with the remainder being officers or employees of Railroad. The officers of Transport are not officers of Railroad and no officer of Railroad is an officer of Transport, except a Secretary whose function is limited to corporate records.

Transport's officers receive their compensation from Transport alone. Historically they were recruited from the trucking industry rather than the railroad. There is no interchange of either officers or employees between the two because of different skills required. Railroad's officers had a pension plan in which Transport's officers do not participate. The single interchange of officers was when the President of Transport was replaced at the original President's resignation. At that time the new President had to resign from Railroad and give up his rights in the railroad pension plan.

Transport's employees have separate rights, being in the Social Security system rather than under Railroad Retirement. They are not subject to the Railway Labor Act. Transport employees are under a contract with the Teamsters union, not Railroad Brotherhoods. A purpose of employing Transport's original President from the

trucking industry was so that he might have his own labor relations with the Teamsters as part of the trucking industry.

Transport, pursuant to its contract with the Teamsters, carried workmen's compensation.

Transport owns and finances its own equipment including trailers, bogies and tractors mostly acquired under its own chattel mortgages. In the year of the accident more than 50% of its equipment was in Flexi-Vans which accounted for some 90% of its business.

The terminals occupied by Transport were mostly built by it. It occupies its own separate offices where no railroad employees are located. The headquarters of the two companies are in adjoining buildings.

Transport fixes its own tariffs setting forth the portion of the revenue each company receives. There are also inclusions for other carriers who receive a portion of joint rates. These tariffs are in addition to certificates for intra-state motor service, some of which were transferred fom Railroad covering supplemental and substituted service for Railroad. This service is not large in relation to the joint Flexi-Van service carried on with Railroad and with other carriers or to private cartage not related to Railroad and was not involved in the accident.

For the joint Flexi-Van service, Transport has no sales department of its own, does not send out its own bills or make its own collections nor pay for advertising the joint service. The tariffs are filed by Railroad as are those of private unaffiliated companies.

Transport maintains its own separate accounts on a different accounting system.

Physical Operation of Transport

At all times the transportation operations of Transport were carried on solely by that company without advice from the railroad.

The mounting of Flexi-Vans on railroad flatcars is performed by Transport employees, is part of the Teamster work and would not under the contracts be performed by railroad labor. The usual procedure was followed in this particular case. The designation of the trailer and the car on which it was to be loaded was made by the Transport supervisor who assigned a team of men to load the van on the car without Railroad employees being involved. There was no inspection or other involvement by Railroad "car knockers" until after the vans were loaded. Railroad supplied the flatcars designated by Transport. The function of Railroad in the operation was to move the car after the van had been loaded thereon. The particular van involved in the accident was brought to Transport's North Bergen yard by an independent carter, AIDS, for shipment to Chicago. Transport received it when it was parked by the AIDS driver. The Transport supervisor assigned a team of Transport drivers to load it on a car he designated. No Railroad men were involved in the operation which caused the death.

Workmen's Compensation

The plaintiff, prior to the institution of the action for herself and her children, applied for and received workmen's compensation in New Jersey under Transport's policy on the basis of Transport being the employer. There was no contest.

2. *The Order for a New Trial*

Judge MacMahon set aside the verdict at the first trial that deceased was an employee solely of Transport only on the ground that "The probative value of the evidence that Plaintiff applied for and received, Workmen's Compensation benefits by reason of her husband's employment by an employer other than Defendant is, necessarily, outweighed by its prejudicial impact on the jury". No other ground had been raised.

3. *Additional Testimony at the Second Trial*

In addition to again reading of the plaintiff's depositions of witnesses Hoffman for Railroad and Reynolds for Transport and minus any testimony for Railroad as to workmen's compensation as to which there was only an offer of the proof produced at the first trial, plaintiff produced two employees who were in the crew with deceased at the time of the accident.

These two employees testified that like deceased and their supervisor, they received their pay from Transport. Like deceased, they paid Social Security not Railroad Retirement.

Like all drivers, including deceased, they were members of the Teamsters. Their supervisor sometimes received instructions from the Transport office. No Transport employee ever received any instructions from any car knocker or other railroad employee. If the car knocker gave any instructions to the Transport office, they received these only through their own supervisors. At this particular accident there were no instructions from any Railroad employee.

4. *The Charge at the First Trial*

The burden of proving employment by the railroad was on plaintiff. Mere unloading or loading is not necessarily railroad work. The question to be determined is, was there supervision by the railroad and this is determined by the extent of any supervision which is not determined by the ownership of stock, the existence of common officers or directors, but whether the corporations dealt at arms length, paying for services rendered and negotiating their own labor contracts.

5. *The Charge at the Second Trial*

The issue is to be determined by the test of day to day control. Stock ownership, common officers and directors or the factors of engagement in loading and unloading are not enough. Likewise, whether Social Security or Railroad Retirement was paid was only one factor. An important factor was whether intercorporate affairs were carried on in a business-like way.

The fatality did not occur in connection with substituted service, but in an activity from which each corporation received its share from the revenue. The direction of the details of the decedent's work determined whose employee he was.

REASONS FOR GRANTING THE WRIT

I

Submission to the jury below is inconsistent with two recent decisions of this Court on trucking or other service related to railroads and the most recent case in the Court of Appeals.

A. The nature of the operation—*American Trucking* v. *A., T. & S. F. R. Co.*, 387 U. S. 397 (1967).

The issue in *American Trucking* was whether railroads could be ordered by the Interstate Commerce Commission to make Trailer on Flatcar service (TOFC), such as Flexi-Van service here involved, available to all, including motor carriers and freight forwarders, for rail service through the use of open tariff TOFC rates published by rail carriers. The I.C.C.'s decision to this effect was upheld in this Court. The result is that a van being placed on a flatcar is a commodity a railroad must ship to the same extent as if it were coal in a hopper car or grain in a box car. This Court adopted the language of the Interstate Commerce Commission to define the industry and its various

forms. As to Plan V, here involved, it was described:

> "Plan V (Joint Intermodal):
>
> Joint railroad-truck or other combination of coordinated service rates. Either mode may solicit traffic for through movement, and traffic moves on originating carrier's bill of lading." (287 U. S. at 443)

The decision was bottomed on the statement in the majority opinion (439) "The controlling fact of the matter is that all piggyback service is, by its essential nature, bimodal. It partakes of both the railroad and the trucking functions."

The application of such rule is that Transport's operations even if carried on in conjunction with the Railroad, even indeed had there been a single corporation, was still the trucking function of the bi-modal operation.

B. The performance of some Railroad functions does not give the employee rights under F.E.L.A. if his employer is not involved in actual railroad operations—*Edwards v. Pacific Fruit Express Co.*, 359 U. S. 528 (1960) and *McCrea v. Harris County Houston Ship Channel Nav. Dist.*, 423 F. 2d 625 (C. A. 5, 1970).

In *Edwards*, the holding was that being engaged in an industry related to the Railroad industry and performing some railroad functions will not bring a claimant within the jurisdiction of F.E.L.A. even though claimant was an employee of a railroad affiliate. There, this Court held (see 539-541) that the fact that the employee of the affiliate was engaged in the business of providing and servicing insulated railroad cars for the carriage of perishable commodities and thereby performing some railroad functions did not bring him within the jurisdictional section of F.E.L.A. (45 U.S.C. 51).

In *McCree* the affiants held not subject to F.E.L.A. was engaged in unloading grain from railroad cars from various railroads.

Undoubtedly plaintiff will argue that these cases have no application because Railroad and not Transport is here being held. While the defendants in *Edwards* and *McCree* were in the position of Transport, the Court should not lose sight of the fact that even if we are to consider deceased an employee of Railroad, his function, which *Edwards* makes decisive, was merely unloading and it is well settled as held in *Smith* v. *Norfolk & Western Railway Company*, 407 F. 2d 501 at 503 (4 C. A. 1969) "• • • historically and traditionally the railroad is responsible neither for loading nor unloading". Of course, deceased was not an employee of Railroad within the F.E.L.A. because his compensation came from Transport and employment under F.E.L.A. connotes a rendering of services for compensation. *Dougall* v. *Spokane, P. & S. Ry. Co.*, 207 F. 2d 843, 846 (9 C. 1953).

II

Submission to the jury below is in direct conflict with two decisions of a State Supreme Court and a Court of Appeals as to the scope of the applicability of the F.E.L.A. as applied to an employee of a trucking affiliate of a Railroad.

A. The Supreme Court of Missouri.

1. *Phelps* v. *M.K.T.R. Co.*, —— Mo. ——, 438 S. W. 2d 181 (Sup. Ct. Mo. 1968), is almost indistinguishable from this case. Plaintiff was an employee of a wholly owned trucking affiliate with common officers and directors. The degree of separation in operations was much less clear than in the present case. The injury took place while plaintiff was loading a tractor on a flatcar. Following *Turpin* and *Fawcett* (*infra*), the Court had no difficulty

in holding that the verdict below for plaintiff was improper and that defendant should have had a directed verdict. Questions of both physical and corporate control were passed on.

This Court granted certiorari in *Phelps*, 393 U. S. 1061, but the action was not prosecuted here.

2. *Turpin* v. *Chicago, Burlington & Quincy RR Co.*, —— Mo. ——, 403 S. W. 2d 233 (Sup. Ct. Mo. en banc 1966), cert. den. 384 U. S. 1003. This case again involved the employee of a trucking affiliate. After a verdict for plaintiff, the Trial Court entered judgment for defendant and the judgment n.o.v. was affirmed. Plaintiff was a truck driver of a wholly owned subsidiary of comparable size and operation to Transport. The injury took place while loading a piggyback car on a flatcar. He received Workmen's Compensation from the affiliate. Both the questions of intercorporate relations and actual control of the operation were discussed at length and decided as a matter of law.

B. The Courts of Appeal, Fifth and Seventh Circuits.

1. *Fawcett* v. *Mo. Pac. RR Co.*, 242 F. Supp. 675 (1963 W. D. La.), aff. 347 F. 2d 243 (5 C. A. 1965), cert. den. 382 U. S. 907 (1965). Plaintiff was an employee of a wholly owned subsidiary injured while unloading freight. Summary judgment for the railroad was affirmed.

2. *Schroeder* v. *Pennsylvania Railroad Company*, 367 F. 2d 452 (C. A. 7, 1968). In this case, which plaintiff will no doubt refer to, no affiliate of the railroad was involved. The so-called independent contractor, it was held, permitted so much actual control of the operation by the railroad that there a jury question was permissible.

III

The decision below, excluding evidence as to workmen's compensation, is in conflict with the most recent decision in the Court of Appeals and not supported by authority in this Court.

A. The Court of Appeals, Fifth Circuit.

The Fifth Circuit in *Dicks* v. *Cleaver* (No. 28734, September 15, 1970, Opinion by Chief Judge Brown, not yet officially reported) held:

> "The problem here is whether a jury, required under the classic test for estoppel to decide whether a party has been misled into action by the adversary, is entitled to know the facts bearing upon who the real party is. More specifically it is whether, in an otherwise run-of-the-mill automobile tail-gating damage suit, the plaintiffs were entitled to prove that the same insurance company was both the workmen's compensation insurer and automobile liability insurer of the named defendant. We hold such testimony to have been here admissible and reverse." (Slip Opinion, 2)

The Court's reason for reaching this result was that without testimony as to the existence of Workmen's Compensation coverage, the relevant facts as to the true interests involved could not be brought home to the jury. The Court referred by way of analogy to *Czaplicki* v. *SS Hough Silvercloud*, 351 U. S. 425 (1956). (Slip Opinion, 14-15).

It is submitted that without such testimony in the present case, there is not a complete record as to the incidence of employment of the deceased by Transport from which it can be determined whether he was entitled to claim benefits under F.E.L.A. as an employee of Railroad.

B. *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34 (1963), relied on by Judge MacMahon is not in point.

Neither the procedural nor the substantive context in *Tipton* was the same as here presented. This Court there sets forth at length (375 U. S. 35, 36) that there were references throughout the trial to the subject of compensation while here it played a very small part in the trial. In *Tipton* there was elaborate discussion of the subject in the charge. Here there was none. Further, the Court in *Tipton* must have had in mind *Reed* v. *Yaka*, 373 U. S. 410. This then recently decided case permitted dual recovery in maritime cases not permitted here.

Schroeder (*supra*), also mentioned by Judge MacMahon adds no independent reasoning, but merely cites *Tipton* on this subject.

Edwards (*supra*), post-dating *Tipton* in this Court, takes a different view of the subject. The Court stated, 390 U. S. at 543:

> "Thus, for 60 years the Federal Employers' Liability Act has been administered with the understanding that refrigerator car companies are not included within the terms of the Act. During that time injured employees have been taken care of under state compensation laws. In fact the petitioner here has already drawn more than $6,000 under the California compensation law. The question of whether employees shall rely on state compensation or on the Federal Employers' Liability Act is a pure question of legislative policy, concerning which apparently even the labor organizations most interested have been divided. Under these circumstances we do not think this Court should depart from 60 years of history to do what is a job for Congress."

IV

Certiorari is appropriate.

In *American Trucking*, it was pointed out that bimodal operations have had an explosive growth (37 U. S. at 401). This Court should not leave in doubt, uncontrolled by a clearly stated rule of law, whether employees of a trucking affiliate of a railroad performing what is clearly the trucking and not the railroad function of the bimodal operation are governed by State compensation laws or the Federal Employers' Liability Act. This is a subject on which the Court has not spoken.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

December 28, 1970.

Respectfully submitted,

James L. Morr,
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New York, New York 10017.

Order Granting Motion for New Trial.

Endorsement

67 Civ. 1295

Plaintiff moves, pursuant to Rule 59, Fed. R. Civ. P., for a new trial claiming error in the court's admitting evidence of plaintiff's having applied for, and received, workmen's compensation benefits, and in the court's failure to instruct the jury on this evidence.

The trial of this case was limited to the question of whether plaintiff's deceased husband was an employee of the defendant-railroad, within the meaning of the Federal Employer's Liability Act, 45 U.S.C. § 51 et seq.

The probative value of the evidence that plaintiff applied for, and received, workmen's compensation benefits by reason of her husband's employment by an employer other than defendant is, necessarily, outweighed by its prejudicial impact on the jury. See *Tipton* v. *Socony Mobil Oil Co.*, 375 U. S. 34 (1963); *Schroeder* v. *Pennsylvania R.R. Co.*, 397 F. 2d 452 (7th Cir. 1968).

Accordingly, we grant plaintiff's motion for a new trial.

So ordered.

Dated: New York, New York
July 22, 1969.

LLOYD F. MACMAHON,
United States District Judge.

Judgment.

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of October, one thousand nine hundred and seventy.

Present: HON J. EDWARD LUMBARD, Chief Judge,
HON. TOM C. CLARK, Associate Justice,
HON. IRVING R. KAUFMAN, Circuit Judge.

Winifred Fisher, as Administratrix of the Estate of Henry Fisher, Deceased,

Plaintiff-Appellee,

v.

New York Central Railroad Co., a Delaware Corp., n/k/a Penn Central Transportation Company,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant, New York Central Railroad Co.

A. DANIEL FUSARO,
Clerk.

FILED
FEB 2 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.

No. 1192

NEW YORK CENTRAL RAILROAD COMPANY, a Delaware Corporation, n/k/a PENN CENTRAL TRANSPORTATION COMPANY (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

against

WINIFRED FISHER, as Administratrix of the Estate of HENRY FISHER, Deceased,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1970.

No. .....

NEW YORK CENTRAL RAILROAD COMPANY, a Delaware Corporation, n/k/a Penn Central Transporation Company (Debtor in Reorganization), a Pennsylvania Corporation,

Petitioner,

against

WINIFRED FISHER, as Administratrix of the Estate of Henry Fisher, Deceased,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Questions Presented.

1. Is certiorari warranted to review either (a) the propriety of submission to jury consideration of the issue of respondent's intestate's status as an employee of petitioner for Federal Employer's Liability Act purposes, or (b) the jury's finding, upon a sifting and evaluation of the factual data presented to it, of the existence of such relationship?

2. Is certiorari warranted to review the discretionary refusal of the District Court to permit evidence that respondent, in her capacity as widow, and not as legal rep-

resentative of the estate of her deceased husband, applied for and received New Jersey Workmen's Compensation benefits, in the face of the clear concession made by respondent upon the trial that her intestate had been employed "of record" by one of petitioner's wholly-owned subsidiary corporations?

Statement of the Case.

The amended complaint claims jurisdiction based upon the Federal Employer's Liability Act (hereinafter FELA) and predicates liability upon the claim that respondent's decedent, while employed "of record" by New York Central Transport Company (hereinafter Transport) was either (a) in fact the employee of petitioner (hereinafter Railroad) at the time of the occurrence, and/or (b) was, in legal effect, such employee by virtue of the inter-corporate relationship between Railroad and Transport.

Railroad's answer denies the material allegations of the amended complaint and further pleads affirmatively an absence of the employment relationship between respondent's decedent and Railroad, and that the application for and receipt of Workmen's Compensation benefits from the State of New Jersey by respondent on behalf of herself and her children constituted an election of remedies barring the action.

The District Court submitted all issues, including the issue of the decedent's status as employee or not of Railroad, to the jury. The verdict rendered was in favor of respondent, and substantial monetary damages were awarded. The Circuit Court affirmed from the bench.

The Factual Context.

Commencing in 1948, Railroad conducted operations as a common carrier by motor vehicle pursuant to I.C.C. certificates granted it permitting such operations. Early in 1960, there was consummated a transfer of these I.C.C. certificates by Railroad to Transport. The interstate motor vehicle operations of Transport have since been conducted solely by virtue of such transferred operating rights, and Transport is enjoined by the terms of those certificates to conduct its operations solely in a manner which is auxiliary and supplemental to the rail service of Railroad. The hallmark of such service is the rendering of the same by a railroad-affiliated motor carrier in a subordinate capacity for the purpose of assisting the railroad in its rail operations. No consideration was paid by Transport to Railroad for the transfer of these operating rights.

From the time of Transport's incorporation to the date of accident, Railroad owned all of the outstanding stock of Transport, for which it paid the sum of $1,000. Railroad made loans to Transport since incorporation of some $2.6 million, none of which was repaid although Transport has a current net worth of almost $9 million and has operated at a profit ever since its incorporation. The majority of the Board of Directors of Transport has at all times been composed of persons who are similarly officers or directors of Railroad.

In connection with a proceeding brought before the Interstate Commerce Commission by Transport (in which it was represented by Railroad's attorney) for the purpose of removing certain key-point restrictions on the operations of Transport, the adverse economic effects of those restrictions upon Railroad's operations was given as the basis for the requested relief, and the proposal to elimi-

nate the key-point restrictions was made by Railroad for the purpose of furthering Railroad's rail service and subordinating Transport's operations to it.

Railroad and Transport maintain their central offices in contiguous buildings and all other offices of Transport for the conduct of its business are located at terminals or yards owned by Railroad. All of Transport's business operations, insofar as rail lines are utilized, run solely on Railroad's lines.

Transport maintains no offices for the solicitation of freight business whatever; all advertising for freight on behalf of Transport is conceived, placed and paid for by Railroad; similarly, Railroad, not Transport, bears all traffic expenses; Railroad, not Transport, prepares the bills and collects the charges for the freight shipped; and Railroad, not Transport, publishes all tariffs under which the traffic moves. Transport services only those geographic locations serviced by Railroad, and Transport maintains no freight terminals of its own.

The frequency and extent of Transport's operations depend solely on Railroad's needs and are determined solely by Railroad. Railroad's executive vice president stated unequivocably that Railroad controlled Transport, and Railroad's attorney (in the aforementioned I.C.C. proceeding) characterized the relationship between Railroad and Transport as that of master and servant.

More than 50% of Transport's equipment consists of Flexi-vans, and more than 90% of Transport's business involves the use of Flexi-vans. The equipment is purchased by Transport from another wholly-owned subsidiary of Railroad, Strick Corporation, and all of said equipment is informally (and orally) leased by Transport to Railroad.

Railroad's "logo," which appears on the Flexi-vans, is a symbol used by Railroad only in connection with its railroading activities.

While many of Railroad's employees belong to the so-called Brotherhood Unions, many others do not.

At various points along its rail lines, Railroad's own employees perform all of the loading and unloading from Transport's equipment, while at other points Railroad employees ("car knockers") inspect the equipment both before and after loading and, on occasion, assist in the physical labor of the operation.

It was stipulated by Railroad's attorneys upon the trial that the work done by respondent's decedent at the time of the accident directly or closely and substantially affected interstate commerce. It was further stipulated that respondent's decedent's co-workers, involved in the incident, were to be deemed to have the same status, as employees of Railroad or not, as did plaintiff's decedent.

With respect to the Workmen's Compensation benefits issue, the application therefor was made by respondent in her capacity as wife (widow) of decedent. No proof was tendered by Railroad to indicate whether or not the issue of employment was litigated before the Workmen's Compensation Board; in fact, in its brief before the court below, as in its petition here, Railroad asserts that in connection with the preceeding there was "no contest."

The Court's Charge.

The court charged that the essential determination required of the jury was whether or not Transport was a separate, independent corporation or merely an agent, branch, or department of Railroad set up in corporate form. The court also charged, even absent a deter-

mination that there was such intercorporate relationship that respondent's decedent might still be an employee of Railroad if the jury found that there was the requisite degree of control over the details of decedent's work, not merely the results thereof, so as to constitute him such employee.

No objection was taken by Railroad to this statement of governing law.

The writ should be denied.

None of the issues raised fall within the ambit of Rule 19, Supreme Court Rules, warranting consideration by this court.

A. Neither *American Trucking v. A.T. & S.F.R. Co.*, 387 U. S. 397; *Edwards v. Pacific Fruit Express Co.*, 390 U. S. 538, nor *McCree v. Harris County Houston Ship Channel Nav. Dist.*, 423 F. 2d 605, is inconsistent with the determination made here.

The emphasis petitioner places upon the "trucking" nature of what this court has characterized as a bimodal form of transportation fails completely to take account of the fact that, by whatever name applied to it, the work done by respondent's decedent was stipulated by petitioner to "directly or closely and substantially" affect interstate commerce. The mere fact that the decedent's labor was performed in an industry characterized as involving a bimodal form of transportation does not, we concede, in and of itself suffice to make him an employee of Railroad. But by the same token, such fact does not preclude his being so considered, if facts are presented from which a jury could determine that, in the particular instance, and as the result of the intercorporate arrange-

ments made between his "of record" employer and Railroad, he was indeed Railroad's employee.

Neither *Edwards* nor *McCrea* give comfort to Railroad, since it is conceded and recognized by Railroad that in those cases it was the "of record" employer that was held not to be a common carrier by railroad for FELA purposes. The issue here is far different. In discussing these cases, at page 13 of its petition, Railroad seems to argue that, even if respondent's decedent were deemed to be an employee of Railroad, still the work he did would not afford him the benefits of FELA (citing *Smith v. Norfolk & Western Railway Company*, 407 F. 2d 501, as authority for the proposition that such labor is traditionally not a railroad responsibility). Whether a railroad is "responsible" for loading and unloading or not misses the mark completely. Even absent the stipulation above-noted, it is far too late in the day to question settled doctrine that such labor, by whomsoever performed, and by whatever appellation ("trucker" or otherwise) utilized to describe the performer, involves the performer in work which "directly or closely and substantially" affects commerce (*Baltimore & O.S.W.R. Co. v. Burtch*, 44 S. Ct. 165).

B. The decision below is not in conflict with any pertinent holding of a companion Court of Appeals or any State Supreme Court.

Neither *Phelps v. M.K.T.R. Co.*, Mo. , 438 S. W. 2d 181, nor *Turpin v. Chicago, Burlington & Quincy R.R. Co.* Mo. , 403 S. W. 2d 233, is inconsistent with the result reached below. In each of the cases cited, it was recognized that the issue of employment was, as mandated by this court's decision in *Baker v. Texas and Pacific Railway Co.*, 359 U. S. 227, an issue of fact. All that

Phelps and *Turpin* decided was that, considering the evidence in the respective cases, the presentation made did not rise to the diginity of a genuine issue of fact warranting jury determination. In the case *sub judice*, the District Court reached a contrary conclusion, a conclusion upheld by the determination of the Court of Appeals that the factual presentation indeed raised questions for jury consideration.

We would point out, in passing, that the charge on the law by the District Court here, to which no objection was taken by Railroad, permitted the jury to find that Transport was in reality the alter ego, agent, branch or a department of Railroad set up in corporate form, and not an independent organization. The applicability of this statement of law to the case, even disregarding the fact that Railroad did not object thereto and thus cannot raise the point on appeal, was recognized in *Turpin* itself, where one finds the following:

> "In the absence of fraud, connivance *or an undue domination*, the law recognizes the separate entities of corporations, even though one owns the stock of another; this principle is applicable in solving questions of employment, as here. Nor is the one *for that reason*, the alter ego of the other." (Italics added.)

It was precisely the evidence presented in this case of such "undue domination" which created a fact issue appropriate for jury determination.

Fawcett v. Missouri Pacific RR. Co., 242 F. Supp. 675, aff'd 347 F. 2d 233, cert. den. 382 U. S. 907, is but another example of the rule that issues which are normally factual may, in any given instance, be subject to disposition as a matter of law. In this case, a motion for summary judgment, made by defendant, was granted. The rationale of such grant was the finding by the trial court

of the absence of a genuine issue of fact. The determination was based upon the argument pressed by the plaintiff that because—and only because—"the trucking company is a wholly owned subsidiary of the defendant, it, the trucking company was the alter ego, adjunct, subsidiary agent, and instrumentality of the railroad" (242 F. Supp. at p. 677). On a factual basis, the material presented in *Fawcett* fell far short of the material presented here, which both the District Court and Circuit Court of Appeals have found presented real factual issues concerning the domination of Transport by Railroad. Thus, to argue as petitioner here does, that the determination reached here is in conflict with that reached in *Fawcett*, is to argue for a distinction without a difference, since both courts adopted and recognized the basic principles involved, reaching different conclusions only because of the dissimilarity of the facts involved in each case.

Schroeder v. Pennsylvania Railroad Co., 367 F. 2d 452, of course, is four-square with the instant case, and fortifies the result reached here. The analysis of this case by Railroad in its petition, however, deserves comment.

The distinction drawn by Railroad seems to be that in *Schroeder* no affiliate of a Railroad was involved, but rather an independent contractor who permitted so much control of its operations to be taken over by the railroad so as to raise a jury question under the doctrine noted. If Railroad seeks to make a distinction between a railroad "affiliate" (a term, we assume, Railroad employs to characterize a wholly-owned subsidiary) and an organization not so "affiliated," we fail to find any logic in or forcefulness to such argument. Railroad seems to concede that it is acceptable for a jury to pass upon the question of whether or not a railroad has so controlled the operations of an otherwise independent contractor as

to render that organization an adjunct of the railroad (for which *Cimorelli v. New York Central Railroad Co.*, 148 F. 2d 575; *Pennsylvania Railroad Co. v. Roth*, 160 F. 2d 161, and *Pennsylvania Railroad Co. v. Barlion*, 172 F. 2d 710, is impeccable authority) but that it is impermissible to do so where an "affiliate" of a railroad is involved. It would seem to us that the latter is an *a fortiori* case. In either instance, the ultimate conclusion—that the degree of control exercised by the dominant organization negates any possibility of independent action by the subservient one—makes applicable the rule of law governing cases such as this.

C. The discretionary refusal of the District Court to admit evidence of application for and receipt of Workmen's Compensation benefits not only is in accord with authority in this court, but is likewise in accord with and not contrary to applicable Court of Appeals decisions.

Railroad does not question—as, indeed, it could not—that the procedure followed here relative to the exclusion of Workmen's Compensation evidence is in direct accord with the procedure followed in *Schroeder*. Instead, petitioner urges, in a strained attempt to come within the scope of Rule 19, that the Fifth Circuit permitted evidence of Workmen's Compensation. *Dicks v. Cleaver*, cited by Railroad at its page 15, has literally no bearing here. That case is wholly dissimilar, and the issue there presented is not even remotely pertinent here. The application for and acceptance of Workmen's Compensation benefits by respondent, on behalf of herself and her children, does not constitute an election of remedy barring institution of an action under FELA (*Dennison v. Payne*, 293 F. 333; *Hoffman v. New York N.H. & H.R. Co.*, 74 F. 2d 227, cert. den. 294 U. S. 715; *Bretsky v. Lehigh*

Valley Railroad Co., 156 F. 2d 594; *DeMarco v. Pennsylvania Railroad Co.*, 147 F. Supp. 656). Moreover, in the case at bar, the parties to the Workmen's Compensation proceeding not only were different (Railroad not even being a party to the proceeding, and respondent presenting her claim as widow and not as legal representative of her decedent's estate), but there is a total absence of any showing that the issue of employment was actually litigated so as to bring into play the doctrine of *res judicata*. Moreover, we urge that there cannot possibly be any probative worth assigned to the extrajudicial assertion by decedent's widow that her late husband was employed by Transport in the face of the stated concession made upon the trial that Transport was his "of record" employer, particularly in light of this court's recognition of the gross prejudice resulting from permitting similar evidence to be introduced against a complainant who himself (not even representatively) makes similar assertion (*Tipton v. Socony Mobil Oil Co.*, 375 U. S. 34). The sole and only purpose of such evidence would be to prejudice the trier of the facts against respondent, and the District Court's refusal to allow such evidence was not only appropriate, but certainly could not be characterized as an abuse of discretion of such magnitude as to warrant review by this court.

The argument advanced by petitioner with respect to *Edwards v. Pacific Fruit Express Co.*, 290 U. S. 538, is without merit. That case held simply that Workmen's Compensation benefits were properly obtainable by a claimant *because* FELA did not apply, and not the converse, viz; that FELA was inapplicable *because* Pacific Fruit's employees received Workmen's Compensation benefits.

D. Certiorari is not warranted in this case.

Railroad seeks to have this court review what is nothing more nor less than a simple factual issue (see dissenting opinion of Mr. Justice Frankfurter in *Rogers v. Missouri Pacific RR.*, 352 U. S. 500). Railroad seeks to frame the issue as one involving a determination of whether the employees of a trucking affiliate of a railroad, involved in a bimodal form of transportation, should look for redress for injury under state compensation laws or FELA. That, simply, is not the issue. If, as in *Fawcett*, the claim here advanced was that the fact of such affiliation alone sufficed to bring the affiliate's employees under FELA, there might then be merit to Railroad's position. However, given this case, where the facts present real and genuine issues for jury determination as to whether or not an affiliate was so dominated by its parent company as to render its operations in reality those of its parent, we respectfully submit that there is no special or important reason for granting certiorari. Indeed, the only similar case which our research has uncovered in which this court has granted certiorari is *Phelps* where, following a jury verdict for plaintiff, there was ultimate reversal as a matter of law and direction of a verdict for the defendant. Under these circumstances, the grant of certiorari is understandable, in view of the command in *Baker* that FELA issues of employment ordinarily be decided as questions of fact. Here that issue has been so decided and, we respectfully submit, nothing more remains for review.

Conclusion.

For the reasons above set forth, the petition should be denied.

January 11, 1971.

Respectfully submitted,

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